

**TESTIMONY OF  
DR. WILLIAM T. HOGARTH  
ASSISTANT ADMINISTRATOR FOR FISHERIES  
NATIONAL MARINE FISHERIES SERVICE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
U.S. DEPARTMENT OF COMMERCE**

**BEFORE THE COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES**

**MAY 6, 2003**

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today on H.R. 1835. I am Dr. William T. Hogarth, Assistant Administrator for Fisheries at the National Oceanic and Atmospheric Administration (NOAA). I appreciate the opportunity to testify today regarding the bill, which proposes amendments to the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). NOAA Fisheries shares jurisdiction over implementation of both of these statutes with the U.S. Fish and Wildlife Service (USFWS). NOAA Fisheries administers the MMPA for approximately 150 stocks of cetaceans, seals, and sea lions, while USFWS has responsibility for walruses, manatees, polar bears, dugongs, and sea otters.

H.R. 1835 was recently introduced and is still under review by the Administration. It includes some provisions that are similar to the Administration's Readiness and Range Preservation Initiative. NOAA Fisheries has not yet completed a thorough review of the bill but we are prepared to give preliminary views today. As always, we are happy to work with the Committee to resolve any concerns.

**MARINE MAMMAL PROTECTION ACT**

***Definition of Harassment***

Over the past several years, NOAA worked closely with the USFWS, Department of Defense, Marine Mammal Commission, and others to develop an Administration proposal to reauthorize the MMPA. This Administration MMPA reauthorization bill was transmitted to Congress in February 2003.

Revising the MMPA's current definition of harassment has been a major topic in reauthorization discussions. NOAA strongly supports the proposed amendments to the harassment definition contained in H.R. 1835. These amendments are effectively identical to the proposed harassment definition in the Administration's current proposed MMPA bill, as well as the MMPA reauthorization proposed by the Clinton Administration. We appreciate the work the committee has already done to reauthorize the MMPA and look forward to working with you to achieve timely passage of a bill.

The definition of harassment, a critical component of the "take" prohibition, which is also defined in the Act, has broad applicability throughout the MMPA. The current definition in the MMPA separates harassment into two levels. Level A harassment is defined as, "any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild." Level B harassment is defined as, "any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering."

NOAA has experienced difficulties with interpretation, implementation, and enforcement of the current MMPA harassment definition. First, the definition is limited to acts involving "pursuit, torment, or annoyance." Second, the definition is overly broad and does not provide a clear enough threshold for what activities do or do not constitute harassment. Third, the definition does not provide an adequate mechanism to address activities intentionally directed at individual or groups of marine mammals that could have biologically significant impacts. H.R. 1835 and the Administration's MMPA reauthorization bill both propose very similar revisions to the current definition that would address each of these concerns.

*Inappropriate Two-Tiered Standard:* The current definition of harassment impedes NOAA's ability to adequately enforce the MMPA's take provisions. As the definition is currently written, only those acts involving "pursuit, torment, or annoyance," terms that are undefined in the MMPA, can be addressed. Second, the agency must prove that the act has the potential either to injure or disturb a marine mammal. Thus, the current definition contains a difficult two-tiered standard that the agency must meet before it can prosecute anyone who takes a marine mammal by harassment. As a result, NOAA agrees with the need to eliminate the phrase "pursuit, torment, or annoyance" from the harassment definition.

*Overly Broad:* The current definition of harassment is both broad and ambiguous and, therefore, it fails to create a clear threshold for acts that do and do not constitute harassment. As a result, it is difficult for the agency to prioritize its resources to deal with the types of harassment that have the most negative effects on marine mammals. We are also concerned that the existing definition could result in unnecessary administrative burdens on the regulated community. One could argue, for instance, that any activity has the potential to disturb a marine mammal by causing disruption of behavioral patterns, from humans walking along a pier near a group of sea lions causing them to stop feeding and raise their heads, to driving a ship that causes a wake that dolphins choose to swim in. As interpreted by some courts, the current definition does not distinguish biologically significant, harmful events from activities that result in *de minimis* impacts on marine mammals.

The lack of a clear threshold for harassment in the definition blurs the distinction between those activities that cause insignificant impacts and those that cause truly harmful impacts to marine mammals. This has negative consequences on marine mammals, NOAA, and the regulated

community. First, activities that result in meaningful biological disturbance to marine mammals do not receive the degree of attention that they warrant. Second, NOAA Fisheries must devote its already limited resources to addressing activities and issues that result in biologically insignificant impacts on marine mammals. Third, the lack of clarity in the definition imposes unnecessary regulatory burdens on the regulated community, who are forced to apply for permits for often harmless activities to prevent potential legal consequences. NOAA supports the manner in which H.R. 1835 clarifies the definition of harassment to focus the agency and the regulated community on types of harassment that result in meaningful biological disturbance to marine mammals, rather than those acts that are not likely to have biologically significant impacts on marine mammals.

*Lack of Emphasis on Directed Impacts:* NOAA supports the third tier of the harassment definition in H.R. 1835. This provision makes it explicit that activities that are likely to disturb marine mammals that are directed at individual or groups of marine mammals, such as closely approaching, touching, or swimming with dolphins in the wild, are considered harassment. Members of the public and commercial operators who intentionally interact with wild marine mammals either by boat, in the water, or on land disturb the natural behavior of the animals. They also do a great disservice to these animals over time by habituating them to humans and vessels. In addition, humans who attempt to closely approach, chase, swim with, or touch wild marine mammals place themselves at risk since wild animals are unpredictable and can inflict serious injury if threatened or afraid.

Overall, NOAA feels the proposed definition of harassment contained in H.R. 1835 will apply a clearer standard of harassment to the entire regulatory community and result in more meaningful protections for marine mammals. Additionally, the proposed definition conceptually mirrors recommendations by the National Research Council (NRC) for regulations that are based on the potential for a biologically significant impact on marine mammals. In 2000, NRC pointed out flaws in the current definition of harassment, contending that since science is improving in terms of its ability to distinguish between activities that have significant negative effects and those that have insignificant effects on marine mammals, the harassment definition should be amended to reflect this. The virtually identical harassment definitions contained in the Administration's MMPA bill and H.R. 1835 will both achieve this goal of focusing on activities that will result or could result in significant biological impacts on marine mammals.

### ***Exemption of Actions Necessary for National Defense***

H.R. 1835 would allow the Secretary of Defense, after consulting with the Secretaries of Commerce and the Interior, to exempt any action or category of actions undertaken by the Department of Defense (DOD) from compliance with any provision of the MMPA if it is determined to be necessary for national defense. These exemptions would be granted for up to two years, with additional two-year exemptions possible after further consultation between the Secretaries. While such a provision could result in reduced protections for marine mammals

during times of heightened national security, such a change to the MMPA would be in line with exemptions to protections for endangered and threatened species under the ESA for national security purposes.

### ***Incidental Taking of Marine Mammals in Military Readiness Activity***

H.R. 1835 would amend several parts of the current legislative requirements that authorize incidental take (section 101(a)(5) of the MMPA). Incidental takes are those that are unintentional and may occur during otherwise lawful activities.

The MMPA established a moratorium on the taking of marine mammals in U.S. waters by any person, and by those subject to U.S. jurisdiction on the high seas. In 1981, Congress amended the MMPA to allow “small take” authorizations for otherwise lawful activities. Under the present scheme, NOAA Fisheries will authorize the takes of small numbers of marine mammals if the takings will have no more than a negligible impact on those marine mammal species or stocks, and not have an unmitigable adverse impact on subsistence harvests of these species. Through regulation, NOAA Fisheries has defined “negligible impact” as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.”

In 1986, Congress amended both the MMPA, under the small take program, and the Endangered Species Act to authorize takings of depleted (and endangered or threatened) marine mammals, provided that the taking (lethal, injurious, or harassment) had a negligible impact on small numbers of marine mammals.

H.R. 1835 would delete the “small numbers” standard in Section 101(a)(5) of the MMPA and would no longer require that activities authorized under this section be limited to a “specified geographic region.” These proposed amendments do not change the applicant’s requirement of having to show that their activities are having a negligible impact on the marine mammal species and populations. Additionally, they will have to demonstrate that their activities will not have an unmitigable adverse impact on the availability of such species or stocks for subsistence uses pursuant to the MMPA. These analyses are the key elements to maintaining the health of marine mammal species and are the premise for small take authorizations under the MMPA. Applicants seeking small take authorizations for their activities will still have to abide by all requirements of the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act, where they apply.

Thus, to make the requisite negligible impact determination and to comply with other environmental laws, NOAA Fisheries would still have to know what activities would be taking place, as well as when and where they would occur under the language proposed by H.R. 1835. These small take applications are currently evaluated based on the biological significance of the effect that their actions would have on marine mammals. This will not change under the

amendments proposed in H.R. 1835, and NOAA does not believe that protection of marine mammals will be decreased under this bill.

## **CONCLUSION**

I hope to have the opportunity to work with the Committee to resolve outstanding issues in this bill and to work to improve areas in need of attention in both the MMPA and ESA. I look forward to working with Members of the Committee, your staffs, and other interested members of the public to meet the challenges that we all face in conserving and protecting marine mammals and endangered and threatened species.

This concludes my testimony. Thank you again for the opportunity to testify before your Subcommittee today. I would be happy to answer any questions you may have about my testimony or related issues.